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No. 71-705

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

GALVESTON CITY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-A 28) is reported at 446 F. 2d 1030. The opinion of the district court (Pet. App. B 1-197) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on July 6, 1971 (Pet. App. A 27-A 28). A petition for rehearing was denied on September 16, 1971 (Pet.

App. A 29). The petition for a writ of certiorari was filed on November 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conduct of the district court in engaging in independent research and taking judicial notice of certain sources required its judgment to be set aside.

2. Whether, as a matter of state law, the United States was estopped from denying the validity of a reverter clause in a certain deed.

STATEMENT

1. In 1959, the United States instituted this action in the United States District Court for the Southern District of Texas to quiet its title to 1,078.27 acres of land constituting the northern part of the Fort San Jacinto Military Reservation on Galveston Island in Texas. In the alternative, the government sought to condemn whatever interests petitioners might be found to have in such land.

The relevant history of the land in question begins in the 1830's when "one league" of the eastern end of Galveston Island was granted by a Mexican state to one Menard (Pet. App. B 2). It does not appear, however, that the grant was approved by the president of Mexico, as required by Mexican law (Pet. App. B 190-191).

After Texas became independent, Menard petitioned the new government for confirmation of his title to

the Galveston land. In 1836, the First Congress of the Republic of Texas passed an act granting to Menard the "league" of land, but reserved to Texas a tract of "fifteen acres more or less" on the eastern tip of the island (Pet. App. B 2-3). In 1838, the president of Texas issued Menard a quitclaim deed to the land described in the 1836 Act, specifically excepting the reserve (Pet. App. B 3). This "reserve", shown on an 1837 survey as the "fort reserve" (Pet. Ex. 2; see also Pet. Ex. 3), has undergone major physical changes since 1838 (see Pet. Ex. 4) and is the subject of the present litigation.

In 1842 and 1843, Menard conveyed his land to the Galveston City Company, one of the petitioners herein (Pet. App. B 3-4).

When the Republic of Texas was annexed by the United States in 1845, Texas ceded to the federal government, under the Articles of Annexation (5 Stat. 797-798):

> * * * all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas * * *.

If, as the district court found, the "reserve" on Galveston Island was used for military purposes before and at the time of annexation, title to it passed to the United States under the Articles of Annexation (Pet. App. B 77-78, 82-83).

Having become obscured by the passage of time and the substantial erosions and accretions which affected the eastern end of Galveston Island, the southern line

of the "reserve" was relocated for the government by Major O. H. Ernst in 1889 (Pet. App. B 4-5, 47-51) and was fenced shortly thereafter (Pet. App. B 50, 136-137). Since that time, the government has been in uninterrupted possession of the land north of the Ernst line—land which now consists of more than 1000 acres.

In 1898, prior to constructing additional fortifications on Galveston Island, the government requested a quitclaim deed to the "reserve" from the Galveston City Company (Pet. App. B 5-6). The company furnished a deed, but subject to the condition (Pet. App. B 155):

> that the said property is to be used by the United States of America for fortifications, military or naval posts, and other public purposes of the U.S. Government, only, and if at any time it be abandoned for the purposes aforesaid, or the said property is used for any private purposes whatsoever, then in such, or any or either event, the title to said property hereby conveyed shall immediately revert to and vest in the said Galveston City Company, its successors or assigns.

After years of consideration by various federal officers, the deed was recorded in 1910 (Pet. App. B 6). The land was used by the government for a military fort until 1947 (Pet. App. A 5).

Finally, in 1912, following a state court decision in *State* v. *Jadwin*, 85 S.W. 490, 491 (Tex. Civ. App. 1904), writ of error dismissed, 209 U. S. 553, to the effect that the government had failed to prove that it, rather than Texas, had title to a small parcel of land

located to the north of the fence constructed along the Ernst line on which Texas had constructed a quarantine station (see Pet. App. B 83-84, 138-139), Texas issued a patent to the United States conveying its interest in all lands and accretions thereto north of the Ernst line (Pet. App. B 120-122).

2. The issue of title was tried before the district court in 1963, the court having deferred adjudication of the just compensation issue until such time as petitioners might be found to have an interest in the land in question. In May 1964, the district judge informed counsel of his desire for further evidence on the question whether Texas had maintained fortifications on the reserve from 1838 to 1845 and also announced that he was taking judicial notice of a thesis (see n. 1, *infra*) mentioning use of the reserve in 1838 for military purposes. In response to the invitation, the government introduced additional testimony and some historical papers; petitioners offered no further evidence.

Thereafter, in a lengthy opinion, the district court traced and fully analyzed the transactions dealing with the eastern end of Galveston Island and concluded that the United States presently has title to the original reserve and accretions thereto.

The court of appeals affirmed, holding that the government's title was supported by convincing evidence (Pet. App. A 6). Specifically, the court agreed with the district court (1) that the original grant in the 1830's from the Mexican state to Menard was void since the approval of the Mexican president had not been obtained (Pet. App. A 10), (2) that the reserve

in the grant from the Republic of Texas to Menard was valid (Pet. App. A 11-A 16), (3) that the reserve was used for public defense by Texas in 1845 and thus passed to the United States by the terms of the Articles of Annexation whereby Congress consented to the annexation of Texas (Pet. App. A 18-A 20), and (4) that since the government already had title to the reserve and accretions, the 1898 deed from the Galveston City Company to the United States could not act to limit that title (Pet. App. A 20-A 26).

The court also ruled that the records and exhibits in the case constituted "direct support for our determination of the issues which we find necessary to consider and decide on this appeal" and concluded that if the district court improperly took judicial notice of matters turned up in its research, the error was harmless (Pet. App. A 8-A 9).

ARGUMENT

The decision of the court of appeals is correct, is based principally on state law, and presents no conflict with decisions of this Court or any other federal court. In essence, the case involves no more than a dispute over historical facts—a dispute fully analyzed and resolved in favor of the United States by both the district court and the court of appeals. Accordingly, review by this Court is unwarranted.

1. Petitioners contend (Pet. 16-20) that the district court engaged in extensive independent research, but failed to reflect in its opinion the extent to which its findings and conclusions were based on such re-

search. The contention is without merit. The district court disclosed the source materials consulted and its basis for taking judicial notice (Pet. App. B 6-7, 12-13). As the court of appeals held, direct evidence in the record fully supports the critical findings of the district court (Pet. App. A 8-A 9). Thus, to the extent that it might have been error to take judicial notice of some materials,[1] the error was properly held to have been harmless. See 28 U.S.C. 2111.

2. Petitioners also contend (Pet. 20-23) that under Texas law acceptance of the Galveston City Company's 1898 deed to the United States bound the United States to the terms of the reverter clause in the deed. Both the district court (Pet. App. B 155-164) and the court of appeals (Pet. App. A 20-A 26), however, fully analyzed the Texas doctrine of estoppel by deed and correctly concluded that it was not applicable to the facts of this case because the United States never claimed title to the "reserve" by reason of the 1898 deed. Since, as the courts below found, the reserve was used for military purposes in 1845, it was ceded by the Republic of Texas to the United States under

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[1] The court of appeals specifically criticized the district court only for taking judicial notice of a Master's thesis of a graduate student at the University of Texas entitled "A History of the City of Galveston to 1865," but noted that the district judge had stated that the basic information in the thesis was contained in underlying documents introduced into evidence by the government (Pet. App. A 6-A 8).

the terms of annexation. Once annexation was complete, title to this and all other Texas military property was perfected in the United States without further formalities. *Benson* v. *United States*, 146 U. S. 325, 330; *S.R.A., Inc.* v. *Minnesota*, 327 U. S. 558, 563.

3. Finally, petitioners argue (Pet. 23-25) that the district court erred in not limiting the government's claim to the reserve to the 15 acres contained in the reserve at the time it was established in 1838. Primary reliance is placed upon the state appellate court's decision in *State* v. *Jadwin*, *supra*, pp. 4-5.

As the district court noted in its opinion, the *Jadwin* decision was of little help in resolving the present controversy since the court there merely held on the basis of very limited evidence that the defendant Corps of Engineers had failed to prove that the United States owned a small parcel of land near the Ernest line (see Pet. App. B 83-84, 138-139). Here, on the basis of an extensive record, the district court fully analyzed the relevant facts and concluded that the government had established that it had title to both the original reserve and all accretions thereto.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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